Neutral Citation Number: [2021] EWHC 1211 (Admin)

Case No: CO/1075/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

IN THE MATTER OF AN APPEAL BY CASE STATED
FROM THE CROWN COURT AT GUILDFORD
(Ms Recorder Whitehouse QC sitting with two lay Justices)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2021

Before :

LADY JUSTICE ANDREWS DBE
and
MRS JUSTICE THORNTON DBE

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Between :

THOMAS LEE	**Appellant**
- and -	
SURREY HEATH BOROUGH COUNCIL	**Respondent**

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- -

Richard Doman (instructed by **Fulchers solicitors**) for the **Appellant**
Scott Stemp (instructed by **Surrey Heath Borough Council Legal Services**) for the **Respondent**

Hearing date: 5 May 2021

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Approved Judgment

Lady Justice Andrews and Mrs Justice Thornton:

1. The appellant, Mr Thomas Lee, owns land to the south and east of Swift Lane Caravan Site, Bagshot, Surrey ("the appeal site"). This is in a green belt area, and the only lawful use of the appeal site is agricultural. Mr Lee lives on the adjacent Caravan Site, which is an authorised gypsy/traveller site. He also owns another parcel of land directly abutting the land with which this case is concerned. Both parcels are irregular in shape.

2. On 1 February 2017 the respondent ("the Council"), as the relevant local planning authority, issued an Enforcement Notice to Mr Lee in respect of the whole of the appeal site, in respect of a breach of planning control by a material change of use without planning permission to:

> "*a mixed use for the residential use of caravans, a skip hire business, waste handling, recovery and disposal by burning and spreading of mixed waste (comprising skip waste, soils, hardcore and rubble) together with the storage of building materials, vehicles and caravans."*

3. This did not have the desired effect of causing the objectionable uses to cease. An appeal by Mr Lee against the Enforcement Notice was dismissed by a Planning Inspector in April 2018.

The Stop Notice

4. Meanwhile, on 23 May 2017 the Council issued a Stop Notice in respect of the land, in lawful exercise of its powers under section 183(1) of the Town and Country Planning Act 1990 ("TCPA"). The Stop Notice prohibits the carrying out of certain activities on the land, namely:

    a) Use of the land shown cross-hatched and edged in blue for the storage of:

        i) Building materials
        ii) Vehicles and
        iii) Caravans.

    b) Use of the land shown edged in red for:

        i) A skip hire business
        ii) Waste handling
        iii) Recovery and disposal by burning and
        iv) Spreading of mixed waste (comprising skip waste, soils, hardcore, and rubble).

5. The plan annexed to the Stop Notice shows that the land edged in red is the whole of the appeal site, whereas the land cross-hatched and edged in blue forms the major part of the land on the eastern side of the site. The plan also uses stars to denote the approximate location (though not the numbers) of caravans in residential use on the comparatively narrow strip of land within the appeal site which is <u>not</u> cross-hatched and edged in blue. The final star is positioned almost on top of the blue lines.

6. There are no geographical features by which the boundary between the appeal site and the adjacent parcel of land belonging to Mr Lee can be clearly distinguished, save that the south-eastern boundary of the appeal site appears to follow the course of a drain which is marked on that plan.

7. The Stop Notice required compliance by 6 June 2017. There is no dispute that it was served on Mr Lee.

8. The contravention of a Stop Notice by a person on whom it has been served is a criminal offence, triable either way, and punishable by a fine (TCPA s.187). On 14 May 2018 Mr Lee was convicted before the Justices sitting at Staines Magistrates' Court of failing to obey the Stop Notice by permitting prohibited activities to continue on the land in the period between 6 June 2017 and 6 January 2018.

The decision under appeal

9. Mr Lee appealed against his conviction to the Crown Court sitting at Guildford. The appeal was by way of re-hearing. It was heard by Ms Recorder Sarah Whitehouse QC and two lay Justices on 2 and 3 January 2019. As the judgment relates, the prosecution evidence was presented mainly in the form of photographs taken at aerial and at ground level on five different occasions between 8 June and 21 November 2017. The aerial photographs were taken in June 2017, whereas those taken at ground level were taken on subsequent site visits. The Council also relied on oral evidence from Ingrid Smith, a Planning Enforcement Officer, and Emma Bourne, an Environmental Health and Licensing Manager, as well as some evidence that was read by agreement.

10. The Council was represented, as it was before us, by counsel, Mr Stemp. Mr Lee was represented by his solicitor, Mr Izod. He gave evidence in his own defence, the salient parts of which are summarised in the judgment of the Crown Court.

11. The Crown Court dismissed the appeal and upheld the conviction. It found that the Council had proved that the Stop Notice was breached in various different respects. The main breach was the permitted use of the appeal land for a skip hire business. There was also waste handling, and recovery and disposal by spreading of mixed waste, which appeared to the Crown Court to be "an extension of the skip hire business".

12. The Crown Court also found that the blue hatched area of the appeal site was used for the storage of building materials, including a "large pile" of bricks and some cabling, and for the storage of at least one caravan shown in one of the November photographs "lying at an angle", in which it would have been impossible for anyone to live. There was also a quantity of tubes or lamp-posts on that part of the appeal site which, in the words of Mr Lee's solicitor which the Crown Court adopted, "*would not be high on the list of lighting accessories in B&Q"*. The Crown Court found that if they were not building materials, they were waste and would be caught by the Stop Notice under the general heading of waste handling.

13. The Crown Court rejected Mr Lee's evidence that he was unaware of the prohibited activities that were taking place on his land, and found that he had permitted them to continue after the service of the Stop Notice.

The appeal

14. Section 28(1) of the Senior Courts Act 1981 provides that, subject to subsection (2), any order, judgment or other decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or in excess of jurisdiction, by applying to the Crown Court to have a case stated by that Court for the opinion of the High Court. In practice, appeals by way of case stated are heard by a Divisional Court of the Administrative Court.

15. The procedure for applying to the Crown Court to state a case is set out in Part 35 of the Criminal Procedure Rules. This is expressly referred to in paragraph 2.1 of Practice Direction 52E, which supplements Part 52 of the Civil Procedure Rules. The application must be made no later than 21 days after the decision against which the applicant wishes to appeal, and served on the court officer and "each other party" (in this case, the Council). It must specify the proposed question or questions of law on which the opinion of the High Court will be asked, and the proposed ground(s) of appeal. Those aspects of the rules were complied with.

16. If the Crown Court decides to state a case, then Crim PR 35.3(3)(b) requires the appellant to serve a copy of the draft case stated on each other party. The rules then make provision for the respondent to make representations about and/or revisions to the draft before the case stated is finalised (Crim PR 35.3(6)). Regrettably, those rules were not followed in the present case. The Council was not served with a copy of the draft case stated and therefore had no opportunity to comment upon it. The Council wrote to Mr Lee's solicitors in July 2020 as soon as the final case stated was received, asking for an explanation of why this requirement had not been complied with, but none was forthcoming.

17. Mr Doman, who represented Mr Lee at the hearing of this appeal, told the Court on instructions that his instructing solicitor had served a copy of the case stated on the Council, but was unable to give any details of when or how. Given that the point had been raised by the Council fairly and squarely both in correspondence last July and in Mr Stemp's skeleton argument, we would have expected to have seen a witness statement, at the very least, if this matter was going to be contested. Moreover, as Mr Stemp pointed out, a procedural chronology included in section 11 of the Appellant's Notice, which specifies the date on which the application for a case stated was served on the Council's Head of Property Legal Services, makes no mention of service of the draft case statement on the Council. We are satisfied that the draft was not served on the Council.

The questions of law or jurisdiction on which the opinion of the High Court is asked

18. In consequence, and without any input from the Council, the following five questions were raised by the Crown Court for our opinion:

    (1) Whether or not tarmac or road planings are "waste" and, if they cannot properly be categorised as "waste", was Mr Lee "waste handling and disposing of the waste by spreading"?

    (2) Is the storage of the bricks '*de minimis*'? And even if not, has the Recorder (sic) erred in determining that their storage constituted a "change of use"?

(3) Are lamp posts "building materials" within the meaning of the legislation governing the Stop Notice? If they are "building materials" has the Recorder (sic) erred in determining that their storage constituted a change of use?

(4) Are logs and branches capable of being "mixed waste" as defined in the relevant legislation?

(5) Did the Recorder (sic) err in determining that the damaged caravan was on land subject to the Stop Notice and therefore without her jurisdiction to make a finding?

The learned Recorder delivered the judgment of the Court, but describing it as if it were a judgment of the Recorder alone in this way is not only inaccurate, but insulting to the two lay Justices who contributed to it. It is a little surprising to us that the error was allowed to remain uncorrected in the final version.

How the case was presented to this Court

19. An appeal by way of case stated is limited to the facts and conclusions identified in the case stated. The appeal court may refer to the judgment and, in a case such as this, nobody would suggest that it could not look at the Stop Notice or the plan, but generally speaking it is impermissible to look at any evidence that was before the lower court that is not summarised in the case stated itself, or appended to it at the appellant's request or of the lower court's own motion.

20. There are good reasons why the rules provide that the respondent should be afforded a chance to comment on the case stated before it is finalised. If, as in the present case, the questions asked are irrelevant, (for example because they raise matters that were not argued before the Crown Court or are not open to the appellant as a matter of law), or are based on the erroneous premise that the Crown Court made findings of fact that it did not make, or should be phrased differently so as to focus on the real issue, it gives the respondent an opportunity to explain this to the Crown Court and to put things right.

21. For example, CPR 35.3(4)(d) makes express provision for the content of a case stated if the question is whether there was sufficient evidence on which the Crown Court reasonably could reach a finding of fact. It must specify the finding of fact and a summary of the evidence on which the Court made that finding. At least one of the questions stated for determination by the High Court, question 5, arguably falls within this category. There is nothing in the case stated which refers to the evidence pertaining to the fact-finding that the caravan was on the appeal site, other than the passages setting out the rival contentions of prosecution and defence about allegedly stored caravans at paragraphs 5.5 and 6.5.

22. The upshot was that we found ourselves being invited by Mr Doman to look at the plans and photographs and try and work out for ourselves whether the caravan was on the appeal site or on the adjacent land belonging to Mr Lee, though it is not the function of an appellate court to second-guess the fact findings of the court below. There are further problems with question 5 which we will address in due course.

23. PD 52E, paragraph 2.2 specifies the documents to be lodged by the appellant with the Appellant's Notice. They are: the case stated; a copy of the judgment order or decision in respect of which the case has been stated; and, where that judgment was itself given or made on appeal, a copy of the judgment, order or decision appealed from. The bundle prepared for the hearing of this appeal included not only the application to state a case, the Appellant's Notice, the case stated, the judgment, and the Stop Notice and plan, but:

    a) six witness statements from the Respondents' witnesses at trial;

    b) a transcript of the prosecution closing speech (but not the defence closing speech);

    c) three enforcement notices (including the one referred to above) and the Planning Inspector's decision on the appeal against them; and

    d) the whole of the trial bundle for the hearing in the Crown Court (including the photographs).

    It also included an advice on appeal from Counsel which should not be there at all, and which we have deliberately not read. This is not an appeal to the Court of Appeal (Criminal Division) where such documents are required. The most important documents, the case stated and the Stop Notice, are to be found at pages 287-292 and 334-338 respectively, not right at the front of the bundle as one might expect.

24. Despite producing a bundle running to more than 400 pages, and containing vast quantities of documents that are irrelevant and/or inadmissible, the appellant has failed to provide us with even the most basic bundle of authorities relevant to the issues of law that we have been asked to determine. Moreover, it seems that the relevant provisions of the TCPA would not have been put before the Court had they not been helpfully annexed to Mr Stemp's skeleton argument.

25. The bundle was not served until Wednesday 28 April 2021 for a hearing on Wednesday 5 May, with a Bank Holiday intervening. In consequence of the late preparation and service of the bundle, Mr Doman's skeleton argument was served on 29 April, and Mr Stemp's skeleton argument was received on the afternoon of Friday 30 April.

26. Although no doubt the Court would have worked this out for itself after reading the transcript of the judgment, Mr Stemp pointed out in his skeleton argument that quite apart from the other problems with the questions that the Court was being asked to answer, the appeal served no practical purpose. Mr Lee was asking this Court to "reverse the determination of the lower court" pursuant to section 28A(3) of the 1981 Act. He asked for his conviction to be quashed and the matter remitted to the Crown Court for a fresh trial. That was the only remedy he sought in his Appellant's Notice.

27. The fundamental and insuperable problem with that is that there were at least two infringements of the Stop Notice that the Crown Court found proved which were <u>not</u> the subject of appeal nor the subject of an application to state a case (and could not have been), namely:

a) Mr Lee caused or permitted use of the appeal site for the purposes of a skip hire business, and

b) Mr Lee caused or permitted building materials comprising underground cabling to be stored on the relevant part of the appeal site.

As Mr Stemp stated, in order to secure a conviction, only one breach of the Stop Notice needed to be proved to the criminal standard; come what may, at least two breaches were found proved, including the very serious matter of permitting the continuing activities of, and ancillary to, the skip hire business, and therefore Mr Lee's conviction must stand irrespective of whether the Court answered any of the questions stated in his favour.

28. Whilst in theory the cumulative number of breaches might have had some influence on the level of fine that was imposed, there was no appeal against sentence. (In any event, Mr Stemp informed us at the hearing that Mr Lee was only fined £1,000 despite the seriousness and persistence of the breaches).

29. There appeared to be no obvious answer to this; and so, at the outset of the hearing, the Court raised with Mr Doman the question why it was being asked to determine the answers to questions that plainly made no difference to the safety of his client's conviction. Mr Doman did the best he could to make bricks without straw, but he was unable to provide a satisfactory explanation. It was quite plain to us that nobody on the appellant's side had applied their minds to this obvious and fundamental difficulty with the appeal. Mr Doman ultimately accepted that the most that he could seek from the Court, were he to succeed, would be declaratory relief. He submitted that any established legal errors should not be without a remedy, and that declarations might be of assistance to Mr Lee in the context of ongoing disputes between Mr Lee and the Council over the use of the appeal site.

30. Quite apart from the arid nature of the legal debate, the Court found itself in the invidious position of being asked to determine points of law some of which, at least, turned on the meaning of language used in domestic and EU legislation on which we were aware there was a body of case-law to which neither party had referred, and which, it would appear, we were expected to go and research for ourselves without the benefit of any assistance from counsel.

31. Moreover, as explained below, questions 2 and 3 raise a point about "change of use" that was not even open to Mr Lee to raise before the Crown Court, let alone before us. Other points raised by him were either not within the scope of the case stated, or concerned matters that were not raised below by way of defence, or premised on the hypothesis that the Crown Court had made fact findings which it did not make. However, as the Council had no opportunity to persuade the Crown Court not to state a case in the terms in which it did, there was no chance to try and put things right before it reached us in the shambolic state we have described.

32. Needless to say, we regard this as a highly unsatisfactory state of affairs. Although in these circumstances we would have been fully justified in dismissing the appeal without hearing oral submissions on the merits, we decided in fairness to Mr Lee that we would proceed to hear argument, and that we would deliver a judgment which answers the five

questions stated for our opinion, insofar as it is possible for us to do so. That is therefore how the hearing proceeded, and we reserved our judgment.

Question 1: Whether or not tarmac or road planings are "waste" and, if they cannot properly be categorised as "waste", was Mr Lee "waste handling and disposing of the waste by spreading"?

33. The relevant finding in the case stated is at paragraph 4.1:

> *"tarmac and road planings are "waste". The Court adopted a common-sense approach and interpreted words according to their ordinary English meaning.*"

34. The case stated also records the Council's contentions on the subject at paragraph 5.1:

> *"The Waste Framework Directive 2008 defines "waste" as waste, once it is a by-product no longer required by the original site owner. Road planings are waste according to that Directive and, although they can be recycled, they are waste once removed from the road and/or discarded. "Waste handling" is not confined to the operation of a skip hire business. A common sense approach should be applied."*

35. The relevant extract from the judgment is as follows:

> *"…. But, as far as the spreading of mixed waste is concerned, we have the unchallenged evidence of Sergeant Castell who saw a large excavator being operated and broken up tiles being spread. There's also the evidence of the spreading of road planings. It's submitted by Mr Izod that this is not caught by the definition of mixed waste but we disagree. Again, on a common sense [sic] that road planings are hardcore waste material and the spreading of these - or this material – was the spreading of waste."* (Transcript page 6 B-C)

There is no specific mention of tarmac there or anywhere else in the judgment.

36. Mr Doman submitted before us that the relevant legislative definition of "waste" is in Article 3(1) of Directive 2008/98/EC on waste (the Waste Framework Directive referred to in the case stated). As Mr Stemp pointed out, at all material times relevant to this appeal, s.336(1|) of the TCPA defined "waste" as *including* anything that is waste within the meaning of Article 3(1) of the Directive which is not excluded from the scope of that definition by Article 2(1), (2), or (3) (none of which were relied on in this case).

37. Waste is defined by Article 3(1) as '*any substance or object which the holder discards or intends or is required to discard'*. Mr Doman submitted that the road planings/tarmac were not being discarded by the operators of the skip hire business but were being reused, so they could not be said to be waste.

38. Further, Mr Doman submitted that the Crown Court erred in concluding that tarmac and road planings are 'hardcore' (to which Mr Doman pointed as the relevant term in the Stop Notice). Hardcore is, he said, an industrial term of art to describe solid, not easily degraded, material of low absorbency which is used to create a base layer upon which to construct heavy load bearing stone or concrete. It is commonly made up of

large aggregates such as quarry waste, crushed rock and gravel. Road planings and tarmac are of much finer gradation. As the top layer of any construction base they cannot properly be described as hardcore.

39. One fundamental difficulty with Mr Doman's submissions on this issue is that they were not made before the Crown Court, as is apparent from the description of the defence case in paragraph 6.1 of the case stated:

> *"the defendant contended, so far as it could be ascertained, that road planings are not caught by the definition of mixed waste. The defendant's evidence was that the road planings arrived in tipper lorries, not skips, and he did not therefore consider it to be waste. "Waste handling" should be interpreted by the Court as linked to the Skip Hire business that was being carried on and "waste" must be confined to that which is in a skip."*

That contention was addressed in the judgment at page 4E-F of the transcript and roundly rejected by the Crown Court on the basis that it was irrelevant whether the waste arrived in a skip or not.

40. The fact that no point was made to the Crown Court by the defence about the material having ceased to be waste, or as to the meaning of "hardcore," is supported by this further extract from the judgment:

> *"We have taken the words in the Stop Notice – in the absence of any authority as to their definition – we've taken them to bear their ordinary common English meaning, bearing in mind, of course, the purpose for which Stop Notices are issued."* (Transcript page 3B).

41. Moreover, Mr Doman's submissions fail to grapple with the established legal proposition (which he accepted) that waste can include substances discarded by their owners even if they are capable of economic reutilisation. This would include waste with a commercial value, collected on a commercial basis for reclamation or reuse, as may have occurred. Road planings are, we are told, scrapings of tarmac from the surface of roads. As such, their very nature suggests they have been discarded, and arrived at Mr Lee's site as waste. If so, the real question becomes at what point, if at all, their status as waste changes and they cease to be waste. This is an issue on which there has been considerable discussion in the caselaw, none of which was placed before us or the Crown Court - for the simple reason that it was no part of Mr Lee's defence that the status of the road planings had changed. His case was that they were never waste in the first place (because they were not transported in a skip.)

42. In those circumstances it hardly comes as a surprise to find that material facts necessary to arrive at an answer to the question of whether the operators of the Skip Hire business, or others who did so, were spreading material that had ceased to be waste when they spread the road planings, are simply unavailable. Relevant considerations in this regard might include: where the material arrived from and under what arrangements; the purpose for which the person spreading it was doing so; whether the material was stored before being spread; the timescales for any storage; the environmental condition of the material on arrival at the site; and the environmental conditions in which it was spread, as well as details of transfer notes and any waste management licence.

43. It will be seen from the above that the answer to the question whether something is or is not "waste" is highly fact-sensitive and is not simply "yes" or "no" but "it depends". Therefore the proper question to have asked us was not whether or not tarmac and road planings are waste, but rather, whether the Crown Court was entitled to make the finding on the evidence before it that the road planings were waste. The case stated would then have had to summarise the relevant evidence. We simply do not have the material with which to begin to second-guess its fact-findings, and it is wholly impermissible to invite us to look at the selective extracts from the evidence before the lower court that the appellant's solicitor has chosen to put in the bundle.

44. It is of some importance that Mr Lee appears to have denied that he knew of the activities being carried out on the appeal site and that he had anything to do with what was going on there; that much emerges from the transcript of the judgment (see e.g. page 5B-D). As the Recorder said at the end of the judgment, "the simple way in which the Crown put the case is that Mr Lee may not have been actively involved himself in any of these activities, but he permitted them to continue on his land after the service of the Stop Notice" (transcript page 6D). Although we do not have a transcript of his evidence, it can be assumed that he therefore gave no evidence as to the use to which any road planings were being put once they arrived at the site.

45. In the absence of any such factual material, the Crown Court came to a common sense view that the material was waste. In our view this was a decision entirely open to it, given that the nature of road planings suggest that they arrived on site as waste and on the basis of the case stated for our consideration, drafted by the appellant's legal team alone, there was no evidence from which it could have been concluded their character had changed.

46. As to Mr Doman's further submission that the Crown Court erred in finding that the tarmac and road planings were "hardcore" (it was described as "hardcore waste material" on page 6B of the transcript of judgment) the short answer to it is that the question whether the Crown Court erred in law in that regard is not one that has been stated for our opinion. The appeal is limited to the five questions we have identified above. In any event, Mr Doman's submissions in this regard were based on "hardcore" being an industrial term of art. As we have indicated, it does not appear to have been an argument made before the Crown Court. It is simply too late to raise it now.

47. Since the first part of Question 1 has been answered in the affirmative – in the circumstances of this case, the Crown Court did not err in law in finding that the tarmac and road planings were waste – the second part of the question does not arise. Mr Lee's conviction, insofar as it was based on the finding that they were waste, is safe.

Question 2. Is the storage of the bricks 'de minimis'? And even if not, has the Recorder erred in determining that their storage constituted a "change of use"?

48. The relevant extract from the Crown Court's judgment on this point is:

> *"We accept, and we have borne in mind, that the photographs that we've been shown, do depict quite literally, simply snapshots of what was seen at the site on the five occasions when it was visited. There was no continuous surveillance, however we have drawn common sense conclusions from the evidence presented in the photographs. For example, a large pile of bricks seen in one of the*

> *photographs, cannot on any common sense view, have been put there as a temporary resting place for a few hours before being transported. They were, in our view, plainly being stored…."* (Transcript page 3 E-F)

49. The case stated sets out the Crown Court's fact-findings at paragraph 4.2:

> *No finding of fact was made as to whether the pallet of bricks (sic) was de minimis. The Court's findings were that the bricks were just one category of building material among a quantity of such materials. Bricks are building materials and the Stop Notice required that the defendant cease permitting the land to be used for the storage of building materials. Any such activity was in breach of the Stop Notice."*

50. Mr Doman submitted that the bricks shown in the photograph referred to in the extract from the judgment should be considered *de minimis* given the wider context of the materials on site. He pointed us to the relevant photograph, which shows what can fairly be described as a 'large pile of bricks' in a disorderly heap. Mr Doman said that Mr Lee had given evidence to the Crown Court that since the photograph was taken these bricks had been neatly stacked on a pallet awaiting removal by their owner.

51. We do not accept Mr Doman's submissions. We consider that Mr Doman is seeking, impermissibly, to challenge a factual finding by the Crown Court as to the 'large pile of bricks' – a finding borne out by looking at the photograph. In any event, a *de minimis* argument cannot be said to have any real prospect of success, given that the Stop Notice prohibits the storage of building materials with no *de minimis* qualification.

52. The short answer to the second part of the question is that it is not open to the Appellant to raise the issue of change of use on an appeal against conviction for breaching the Stop Notice, when change of use does not appear to have been challenged in the appeal against the Enforcement Notice. Pursuant to section 285(1) of the TCPA, the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may have been brought. The grounds on which an appeal may be brought include that the matters stated in the notice "have not occurred" (section 174(2)(b) TCPA). The validity of the Stop Notice itself (and the premise underlying it that storage of building materials was a change of use) was never in issue before the Crown Court.

53. When we raised this matter with Mr Doman he was constrained to accept that the legal objection articulated above was correct. The same point arises in respect of the second limb of question 3. It is not the sort of point that we would expect a Crown Court to pick up for itself, but matters would have been rather different if the Council had been served with the draft case stated.

Question 3. Are lamp posts "building materials" within the meaning of the legislation governing the Stop Notice? If they are "building materials" has the Recorder erred in determining that their storage constituted a change of use?

54. We question whether this issue is properly before us, given that the Crown Court made no finding in relation to whether the lamp posts were building materials:

> "*… however if they are not strictly speaking building materials – and we make no finding in relation to that – and if they're not building materials, then they are waste and would be caught under the general heading of waste handling.*" (Transcript page 4 C-D).

55. In the case stated (which we understand was finalised without the benefit of seeing that transcript) the Crown Court said, under the heading "the Court's relevant findings of fact", at para 4.3:

> "*Lamp posts are "building materials" or, if they are not "building materials" they are "waste". The Court adopted a common-sense approach and interpreted words according to their ordinary English meaning. The lamp posts are either building materials or waste and the Stop Notice required that the defendant cease permitting the land to be used for the storage of building materials and waste handling. Any such activity was in breach of the Stop Notice".*

We intend no criticism of the Crown Court for that minor difference in its recollection of its fact-findings. Quite apart from the fact that it did not have a transcript, the Court did not have the assistance of the Council's views on the draft case stated or the questions posed in it.

56. If the Crown Court had decided the lamp posts were building materials, that would not have been a perverse finding; hollow metal poles could be used in construction. In any event, whether lamp posts are building materials is a question of judgment based on facts which were not explored because the Crown Court did not consider it necessary to do so. It had reached the view that irrespective of whether the posts were building materials they were undoubtedly waste, and their presence on the appeal site was a breach of the Stop Notice regardless of their characterisation. We see no mistake in its conclusion in this respect. In the absence of evidence to the contrary, it is reasonable to assume that, like so many of the other items shown in the photographs, the lamp posts constituted discarded material.

Question 4. Are logs and branches capable of being "mixed waste" as defined in the relevant legislation?

57. Mr Doman made the sensible decision not to pursue this issue, given that the Crown Court made no findings about logs and branches adverse to Mr Lee. In fact, as the case stated makes clear in paragraph 4.4, it made no findings of fact in relation to that point. The transcript of the judgment bears this out. The Court said:

> *"as for disposal by burning, we haven't seen any images of waste being burnt after the Stop Notice came into effect, apart from tree branches, and so we give Mr Lee the benefit of the doubt in relation to that".* (Transcript page 6A).

This is another example where we doubt the Crown Court would have referred the question to us had it been given the assistance it was entitled to expect and did not receive.

Question 5. Did the Recorder err in determining that the damaged caravan was on land subject to the Stop Notice and therefore without (sic) her jurisdiction to make a finding?

58. The question makes no sense grammatically, but the contention appears to be that the caravan was on the adjoining land belonging to Mr Lee, and therefore, even if it was being stored and not used for residential purposes, that was not a breach of the Stop Notice. The argument is put on the basis that the Crown Court had no jurisdiction to determine that anything done on neighbouring land was an infringement of the prohibitions in that Stop Notice.

59. The case stated makes the following pertinent fact findings:

> "*One caravan was not in residential use and was on land covered by the Stop Notice"* [para 4.5].

60. The relevant extract from the judgment is as follows:

> *"… As far as caravans are concerned, we agree that a caravan in residential use, is not being stored, and we note – and I've already said – that the use of residential caravans was not included in the Stop Notice. However, there is at least one caravan which we are satisfied was not used for residential purposes. It was photographed on the 21st November and is shown lying at an angle. We agree that it would not be possible for anyone to sleep there, cook there or live there."* (Transcript page 4 D-F)

61. Before us, Mr Doman submitted that there was evidence to suggest that the damaged caravan (referred to in the court below as the "wonky caravan") lies outside the geographical scope of the Stop Notice and, as such, the Crown Court had no jurisdiction to rule that it could properly form a basis for Mr Lee's conviction. Mr Doman accepted that this argument did not seem to have been advanced with particular force (if at all) before the Crown Court.

62. However, it was common ground before us that this did not affect the question of the Court's jurisdiction – if it was properly characterised as a matter of jurisdiction - because either the Court had jurisdiction to deal with a particular matter, or it did not. It was also common ground that the question for us is whether we can reasonably conclude that the Crown Court erred in proceeding on the basis that the damaged caravan *was* on land within the scope of the Stop Notice. That is another way of saying that the fact-finding that it was on the appeal site was not open to it on the evidence.

63. Analysed in that way, there is real doubt as to whether this is really a jurisdictional issue at all, rather than simply being another challenge to a fact-finding (this time, as to the location of the caravan). The Crown Court plainly had the jurisdiction to determine where the caravan was; if it could not have decided on the evidence before it that it was on the appeal site, then arguably it erred in law in finding that there was a breach of the Stop Notice in storing it on the appeal site.

64. As to this, Mr Doman realistically accepted that the evidence about the caravan's location was not particularly clear from the available material, but he pointed to an aerial photograph exhibited by the Council's enforcement officer, Mr Glen, taken in June 2017, and a photograph of the caravan in question, taken in November that year, to

suggest that it might be inferred that the caravan was adjacent to hardstanding on land belonging to Mr Lee which does not form part of the appeal site.

65. In his submissions in response, Mr Stemp pointed to a number of factors which he said demonstrated that the caravan was located on land within the scope of the Stop Notice. Unlike Mr Doman, he was present at the hearing, representing the Council. He did not recollect any point being taken in relation to the location of the caravan as being outside the area covered by the Stop Notice. That would have been an obvious point for Mr Lee to raise in his defence if it were so. Mr Stemp pointed to his closing submissions, which proceeded on the basis that the "wonky caravan" was within the scope of the Notice.

66. Mr Stemp stressed that the aerial photograph relied on by Mr Doman for his submission had been taken five months before the photograph of the "wonky caravan" referred to in the judgment, and submitted that no inferences could be drawn as to the latter's location from the aerial photograph. He also drew our attention to the absence of transcripts of the oral evidence given by Mr Lee or the Council's enforcement officers, who may have said something relevant on this topic. Mr Stemp said he recalled a discussion during the course of evidence about the location of four caravans positioned separately from the residential caravans and which appeared to be stored. It is his recollection that there was no suggestion during this discussion that their location was outside the area covered by the Stop Notice.

67. Mr Stemp's recollection generally accords with what the Crown Court says in the case stated. The Court records at paragraph 5.5 the contentions of the Council that two (not four) caravans were not in residential use and were in the area covered by the Stop Notice, one described by Ingrid Smith as "a perpendicular caravan" (which appears to be the "wonky caravan") and another that did not appear to be in residential use. They could be seen on the photographs and plans (unfortunately the case stated does not identify *which* photographs or plans). The defence submissions, recorded in paragraph 6.5 of the case stated, were that all the caravans were in residential use. That paragraph says:

> *"the Court does not recall that the defendant contended in his evidence that the caravans identified by the prosecution as being non-residential and therefore "stored" were not on the land covered by the Stop Notice."*

68. Given the length of time that the appellant's solicitors have been in possession of the case stated, one might have expected that, having seen that paragraph, if Mr Lee did think he said something about it in his evidence, they would have sought a transcript of his evidence to check it.

69. We are quite satisfied, after hearing from Mr Stemp and reading the case stated and the transcript of the judgment and, *de bene esse*, the transcript of the prosecution's closing speech in which Mr Stemp addressed the matters raised by the defence, that this point was never raised by the defendant in the Crown Court, or even so much as hinted at. It has all the hallmarks of an afterthought.

70. In any event, having listened carefully to the submissions of Counsel and considered the materials before us, we have no doubt that it was open to the Crown Court to proceed on the basis that the damaged caravan was located on land within the scope of the Stop Notice. It is not really a point on jurisdiction, so much as a point as to the sufficiency of

the evidence before the Crown Court upon which it could properly conclude that it was sure that the caravan was on the appeal site. Plainly there was enough evidence before the Crown Court for it to make the findings that it did; the "evidence" suggesting that the caravan was located outside the appeal site was no more than speculation.

Conclusion

71. We answer the questions stated for our opinion as follows:

(1) The answer to the question whether tarmac or road planings are "waste" depends on the facts and circumstances of the case and the evidence before the fact-finding tribunal. There was no error of law in the Crown Court's finding that the road planings were "waste" and that Mr Lee was in breach of the Stop Notice by permitting "waste handling and disposing of the waste by spreading" on the appeal site.

(2) No. Any storage of bricks on the blue cross-hatched area of the appeal site was a breach of the Stop Notice. Therefore, as the Crown Court rightly held, the question of whether the storage was "*de minimis*" does not arise and would not give rise to a defence. In any event the Crown Court was entitled to describe this as a "large pile of bricks" which was among other building materials being stored (including the cables). It is not open to the appellant as a matter of law to challenge the Crown Court's determination that storage of the bricks (or any other building materials) constituted a "change of use" and there was therefore no error of law in that determination.

(3) It could be rationally determined that lamp posts are building materials, but since the Crown Court made no finding that these lamp posts were, but rather found that they were waste even if they were not building materials, the Crown Court cannot have erred in law in the manner postulated in the question. There was no error of law in determining that storage of building materials constituted a change of use and it is not open to the appellant to contend otherwise.

(4) This question does not arise on the facts, it never did, and it has not been pursued by the appellant.

(5) No.

72. For the reasons we hope we have made clear in this judgment, the appeal should never have been pursued. It was a complete waste of court time and put a public authority to unnecessary expense of its scarce resources. Mr Lee's conviction is and always was entirely safe. There were no arguable errors of law in the Crown Court's judgment. Many of the points raised on this appeal were not articulated by way of defence and even Questions 1 and 5 which, in other circumstances, might have given rise to arguable points, were doomed because there was no evidence to support them.

73. Fortunately for Mr Lee, the Council's bill of costs is modest, and we are able to deal with costs by way of summary assessment. Had matters been otherwise, we would have had no hesitation to make an order for the Council's costs to be assessed and paid on the indemnity basis.